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VIA EMAIL AND ECF

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The Honorable John F. Docherty
United States Magistrate Judge
District of Minnesota
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St. Paul, MN 55101
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April 14, 2022

RE: *In re EpiPen Direct Purchaser Litig.*, No. 20-cv-00827 (ECT/JFD)

Dear Judge Docherty,

Pursuant to the Court's October 6, 2021 Order Regarding Case Management Conferences (ECF No. 249) and November 9, 2021 and January 20, 2022 Amended Orders Regarding Case Management Conferences (ECF Nos. 307 and 366), Plaintiffs submit this letter addressing the status of discovery and the topics listed in the Joint Agenda submitted on April 12, 2022 (ECF No. 418).

The Court recently asked the parties to "address whether the upcoming Case Management Conference should be rescheduled to allow the parties time to adapt to the implications of the Court's [414] Opinion and Order granting in part and denying in part the PBM Defendants' Motion to Dismiss." ECF No. 417. Plaintiffs believe that it would be useful to reschedule the conference to April 26, 2022, but are prepared to proceed on April 19, 2022, as currently scheduled, if the Court does not have availability on or about April 26, 2022. The additional week will provide the parties an opportunity to confer concerning Plaintiffs' filing a revised Motion to Compel Election of Defenses (see *infra* at III.A) while ensuring that the Court remains informed of the status of other ongoing discovery.

STATUS OF DISCOVERY

A. Plaintiffs' Production

Rochester Drug Co-Operative, Inc. ("RDC") and Dakota Drug, Inc. ("Dakota") have substantially completed their production of documents and data in response to the PBM Defendants' First Set of Requests for Production. Plaintiffs are collecting documents in response to the PBM Defendants' Second Set of Requests for Production.

B. Defendants' Production

As discussed below, by the March 31, 2022 substantial completion deadline, the Defendants each made productions of varying sizes. Plaintiffs are reviewing the productions and following up with Defendants regarding outstanding issues.

AGENDA ITEMS

I. PLAINTIFFS' DOCUMENT DISCOVERY DIRECTED TO MYLAN

A. Status of production by the Mylan Defendants

Starting on February 15, 2022, Mylan produced 172,660 documents not produced as part of Mylan's initial production. Mylan has indicated that it anticipates further production after its ongoing privilege review. Mylan has not produced any privilege logs as yet. Plaintiffs are reviewing Mylan's production to date and have no substantive issues with the production to raise with the Court at this time.

II. PLAINTIFFS' DISCOVERY DIRECTED TO PBM DEFENDANTS

A. Express Scripts

1. Status of production by the Express Scripts Defendants

Express Scripts has produced 32,487 documents not previously produced in the other EpiPen cases. Express Scripts has indicated that it anticipates producing an unspecified amount of additional documents and a privilege log. Plaintiffs are

reviewing the productions made to date and do not presently have any issues regarding them to raise with the Court.

B. CVS Caremark

1. Status of discovery negotiations between Plaintiffs and CVS Caremark Part D Services, L.L.C.

As noted in Plaintiffs' February 17, 2022 letter to the Court, the parties engaged in a meet and confer call on January 20, 2022, regarding Plaintiffs' requests for production directed to the newly-added defendant CVS Caremark Part D Services, L.L.C. ("Part D Services"). On February 24, 2022, the parties engaged in another meet and confer call, during which Caremark represented that it would make proposals regarding document production for Part D Services. Plaintiffs followed up that call with correspondence dated March 2, March 10, and March 15, requesting a proposal from Part D Services to assist Plaintiffs with formulating a position on interim deadlines for substantial completion, which was due to be filed with the Court on March 17. Plaintiffs ultimately agreed to the June 15, 2022 deadline for substantial completion without receiving the proposal from Part D Services.

Notwithstanding the commitment by Part D Services to substantially complete its discovery productions by June 15, 2022, Plaintiffs remain concerned about whether that will actually happen because of the ongoing delays in discovery negotiations. As the Court may recall, in prior letters and case management conferences, Plaintiffs discussed the fact that Caremark failed to respond to numerous discovery letters over several months, and Caremark failed to provide any kind of written discovery proposal until approximately eight months after Plaintiffs' initial discovery requests were served. Plaintiffs are concerned that a similar pattern is occurring with respect to Part D Services.

Specifically, Part D Services responded to Plaintiffs' first and second sets of document requests in December 2021. The parties engaged in a meet and confer call to discuss these issues on January 20, 2022, and on February 3 and 15, 2022, Plaintiffs sent letters detailing the types of documents that Plaintiffs sought.

However, despite repeated statements by Caremark's counsel over several weeks that Part D Services would produce a concrete written discovery proposal to

Plaintiffs (and Plaintiffs' repeated letters asking about the status of such a proposal), Plaintiffs have yet to receive any such proposal.

2. Status of production by Caremark, L.L.C., Caremark RX, L.L.C., and CaremarkPCS Health, L.L.C.

Caremark, L.L.C., Caremark PCS Health, L.L.C., and Caremark Rx, L.L.C. made productions of documents not previously produced in the other EpiPen cases on February 16, March 18, March 31, and April 8, 2022, totaling 25,686 documents which consist of 199,791 pages.

3. Plaintiffs' Rule 30(b)(6) Deposition Notice to Caremark

On April 6, 2022, Plaintiffs served a Rule 30(b)(6) deposition notice on Caremark seeking information regarding rebate and other data Caremark has produced in this litigation. Plaintiffs initially sought to obtain information about Caremark's data through written correspondence (as Plaintiffs have successfully done with ESI, OptumRx, and Mylan), but were forced to issue a 30(b)(6) deposition notice due to Caremark's failure to provide responses to the data questions included in Plaintiffs' November 17, 2021 letter to Caremark, despite Caremark's representation that it would do so no later than the first week of March 2022.

On April 12, 2022, less than a week after Plaintiffs served the deposition notice, Caremark responded to the data questions in Plaintiffs' November 17, 2021 letter and requested that Plaintiffs withdraw the deposition notice. Plaintiffs are in the process of evaluating Caremark's written responses and the prospects of proceeding with the deposition currently noticed for April 28, 2022.

C. OptumRx

1. Status of production by OptumRx

Since the parties' last status conference, OptumRx made small productions of documents not previously produced in the other EpiPen cases on March 22, March 25, March 29, and March 31, 2022. These productions totaled 2,781 documents, consisting of 17,118 pages.

Plaintiffs continue to review these documents and are following up with OptumRx regarding the “Financial Sampling” production, and whether OptumRx has other productions to make.

III. PLAINTIFFS’ WITHDRAWN MOTION TO COMPEL ELECTION OF DEFENSES

A. Plaintiffs’ Intent to File Amended Motion to Compel Election of Defenses

On March 21, 2022, Plaintiffs filed a Motion to Compel Election of Defenses (ECF No. 405) (the “Motion”). That Motion argued, *inter alia*, that Defendants should identify and disclose to Plaintiffs all defenses and affirmative assertions that they intend to raise in defense of Plaintiffs’ RICO claims (ECF Nos. 407, 412).

On April 5, 2022, the Court ruled that the federal Anti-Kickback Statute (“AKS”) “cannot form a predicate act for Plaintiff’s RICO claims.” ECF No. 414, at 13. Because Defendants’ potential defenses to AKS violations played a central role in the Motion, Defendants asked Plaintiffs if we intended to withdraw it. Plaintiffs informed Defendants and the Court that we would withdraw the Motion without prejudice, and intended to file a revised motion. On April 7, 2022, Plaintiffs withdrew the Motion without prejudice (ECF No. 416).

Plaintiffs currently intend to revise and re-file the Motion after meeting and conferring with Defendants on Monday, April 18, 2022.

IV. PBM DEFENDANTS’ REQUESTS TO PLAINTIFFS

A. Dakota’s custodial documents, including electronic records and paper documents

As directed during the January 18 and February 22, 2022 status conferences, Dakota retained IT specialist Jonathan Robins to conduct an investigation into former employees’ emails and reported the findings of that investigation on March 17, 2022. Plaintiffs received no communications from Defendants about the investigation until April 13, 2022. After the close of business yesterday, Defendants sent a letter to Plaintiffs asking a number of questions about Mr.

Robins' findings and requesting that Dakota run additional search terms. Dakota will consider Defendants' letter and respond directly to Defendants.

Dakota addressed Defendants' questions about paper documents before the February 22 status conference and has received no further communications from Defendants on this topic.

B. Plaintiffs' response and production to PBM Defendants' second set of document requests

Plaintiffs timely responded to PBM Defendants' second set of document requests on February 28, 2022. The parties conferred via teleconference on April 7. Plaintiffs are collecting responsive documents and will make productions promptly.

Respectfully submitted,

ODOM & DES ROCHES, LLC

By: /s/ Stuart E. Des Roches
Stuart E. Des Roches

SEDR:kf
no encl.
cc: All counsel (via ECF)